Supreme Court, U.S.
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No. 95-1325

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

VILLAGE OF LAKE BARRINGTON, an Illinois Municipal Corporation, VILLAGE OF LAKE BARRINGTON SPECIAL SERVICE AREA NUMBER THREE, NANCY SMITH and JAMES P. BATEMAN,

Cross-Petitioners,

v.

MARY E. HOGAN, COLE TAYLOR BANK, as Trustee Under Trust No. 77-432 dated December 19, 1977, SAM LOIACONO, RUTH LOIACONO, and LAKE BARRINGTON INDUSTRIAL PARK ASSOCIATION,

Cross-Respondents.

On Cross-Petition for Writ of Certiorari to the Appellate Court of Illinois, Second District

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

DANIEL P. FIELD
Counsel of Record
204 North West Street
Waukegan, Illinois 60085
(847) 662-5800

Attorney for Cross-Respondents

Midwest Law Printing Co., Chicago 60610, (312) 321-0220

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QUESTIONS PRESENTED

I.

When a Motion to Dismiss for failure to state a claim upon which relief may be granted is made, is the sufficiency of a Complaint brought pursuant to 42 U.S.C., Sec. 1983 alleging a denial of or a retaliation by a public official of a citizen's right of access to the Courts to be determined by application of the balancing test set forth in *Pickering v. Board of Education of Township High School District No. 205*, 391 U.S. 563 (1968).

II.

Was it clearly established at the time Cross-Petitioner acted that the acts of Cross-Petitioner in threatening and then filing sanctionable sham litigation to prevent citizens from seeking a judicial determination of the validity of Ordinances imposing a new tax upon them violated Cross-Respondents' Constitutional rights.

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STATEMENT OF THE CASE

I.

THE FACTUAL BACKGROUND

The Illinois Legislature has adopted the Special Service Area Tax Act, 35 ILCS 230/1 *et seq*. which allows municipalities in certain circumstances to provide special service to specific geographic areas within their boundaries and to impose taxes to provide for the payment of any debt incurred as a result of the provision of those services. In 1992, the VILLAGE OF LAKE BARRINGTON attempted to create such a Special Service Area to provide an underground municipal water line and sewer system to an area within its corporate limits. On October 20, 1992, the VILLAGE enacted an Ordinance which established the SPECIAL SERVICE AREA. On November 17, 1992, the VILLAGE adopted an Ordinance which provided for the sale of bonds in the aggregate amount of SEVEN MILLION DOLLARS to pay for the proposed improvements within the SPECIAL SERVICE AREA. That Ordinance provided that the bonds would be paid for by taxes imposed against the owners of real property within the SPECIAL SERVICE AREA.

Certain owners of property within the SPECIAL SERVICE AREA, including Cross-Respondents, believed that the VILLAGE had not fully complied with the procedure set forth in the aforementioned statutes in creating the SPECIAL SERVICE AREA. As a result, they hired an attorney to seek a judicial determination of the validity of the Ordinances. The attorney for the Cross-Respondents advised the VILLAGE attorney, Cross-Petitioner, JAMES BATEMAN, that he did not feel the Ordinances were valid. Cross-Petitioner BATEMAN advised this

attorney that should he pursue efforts on behalf of Cross-Respondents BATEMAN would sue Cross-Respondents on behalf of the VILLAGE for damages in an amount equal to the proposed bond issue.

II.

THE PROCEEDINGS IN THE COURTS BELOW

On January 5, 1993, Cross-Petitioner, JAMES BATEMAN, filed a two Count Complaint against Cross-Respondents and other unknown owners of real property within the SPECIAL SERVICE AREA. This suit was brought on behalf of the VILLAGE and its SPECIAL SERVICE AREA. Count I sought a declaration of the validity of the SPECIAL SERVICE AREA Ordinances while Count II purported to state a cause of action against Cross-Respondents for tortious interference in the contractual relationship between the VILLAGE and the firm retained to sell its bonds and sought damages in the amount of six million dollars. On March 22, 1993, an Amended three Count Complaint was filed. Count I sought a declaration of the validity of the SPECIAL SERVICE AREA Ordinances. Counts II and III, once again, sought a judgment of six million dollars in damages against Cross-Respondents on theories of tortious interference with contractual relations and tortious interference with prospective economic advantage respectively. Cross-Respondents filed a Counter-Complaint and Third-Party Complaint pursuant to 42 U.S.C., Sec. 1983.

On April 21, 1993, the Trial Court dismissed the damage claims filed by Cross-Petitioner with prejudice stating that "it appearing that no set of facts can be alleged which will be legally sufficient to state a cause of action

for intentional interference with contract or economic expectancy, Defendants' Motions are granted *with prejudice*" (emphasis in original) (R.App. 1).

On July 28, 1993, Cross-Respondents filed their First Amended Counter-Complaint and Third-Party Complaint against Cross-Petitioner, JAMES BATEMAN and others. It is Count I of that Counter and Third-Party Complaint which gives rise to the Cross-Petition for Certiorari.

Count I of the Amended Counter-Complaint and Third-Party Complaint (hereinafter "Complaint") was directed against the VILLAGE and the SPECIAL SERVICE AREA as Counter-Defendants and NANCY SMITH, then the Village President, and Cross-Petitioner, JAMES BATEMAN, the Village attorney, as Third-Party Defendants. Count I was brought pursuant to 42 U.S.C., Sec. 1983 and alleged that upon learning that certain owners of property within the SPECIAL SERVICE AREA had retained counsel and were prepared to file a suit to contest the validity of the Ordinances which created the SPECIAL SERVICE AREA and imposed six million dollars in additional taxes upon the property owners therein, Cross-Petitioner and the other Counter/Third-Party Defendants undertook a course of conduct which was intended to deter the citizens from seeking a judicial determination of the validity of the Ordinances. This course of conduct included threats against those individuals of a multi-million dollar suit for damages unless they agreed, in writing, to forbear the exercise of any right vested in them by the First Amendment to the United States Constitution to challenge the Ordinances and, upon their refusal to do so, culminated in the filing of the aforementioned action for damages.

Count I further alleged that such threats and the filing of the damages action was in retaliation for the statement by Cross-Respondents that they would exercise their right of access to the Courts and their petitioning of the State's Attorney and Attorney General each to bring actions in the nature of Quo Warranto against the VILLAGE and the SPECIAL SERVICE AREA. Such retaliation constituted a deprivation by Cross-Respondent and the others of rights secured to the property owners by the First and Fourteenth Amendments to the United States Constitution and was thus actionable pursuant to 42 U.S.C., Sec. 1983. Count I sought both a declaration that the action of the Cross-Petitioner and others deprived Cross-Respondents of their civil rights and damages for said violations. The Complaint further alleged that as a result of Cross-Petitioner's threats, Cross-Respondents advised their attorney to forbear seeking a judicial determination of the validity of the Ordinances due to their fear that Cross-Petitioner would carry out his threat to sue them for damages. (A copy of Cross-Respondents' First Amended Counter and Third-Party Complaint is included in the Appendix to the Cross-Petition for Writ of Certiorari at pages 1-15.)

On November 24, 1993, the Circuit Court of Lake County, Illinois entered its Order granting Cross-Petitioner's Motion to Dismiss Count I on the basis that the filing of the damages action was protected by the Noerr-Pennington Doctrine and that the allegations of Count I did not clearly state a "sham" exception to that Doctrine (Appendix to Cross-Petition for Writ of Certiorari, P. 28).

However, on August 11, 1994, the Circuit Court granted Cross-Respondents' Motion brought pursuant to Ill.S.Ct. Rule 137 finding that Cross-Petitioner's pur-

ported legal theories advanced in support of the damages action were without any reasonable basis in law or the extension or modification of existing law and that the action was filed without any legitimate purpose but was filed for the purpose of intimidating the Cross-Respondents and imposed sanctions against Cross-Petitioner in the amount of five thousand dollars plus Court costs as a result of said filing (R.App. 3).

Cross-Respondents appealed the Dismissal of Count I of their Complaint to the Illinois Court of Appeals. Cross-Petitioner BATEMAN also appealed the imposition of sanctions against him. In its opinion filed May 2, 1995, the Appellate Court of Illinois reversed the Trial Court Order dismissing Count I of the Complaint against Cross-Petitioner BATEMAN, the VILLAGE and the SPECIAL SERVICE AREA. It affirmed the dismissal of Third-Party Defendant, NANCY SMITH. The Appellate Court also affirmed the Order imposing sanctions against Cross-Petitioner BATEMAN. The Appellate Court found that Cross-Petitioner was not entitled to qualified immunity and that the action for damages he filed against Cross-Respondents constituted sham litigation (Appendix to the Petition for Writ of Certiorari, Case number 95-1097 at pages 1-22).

The Court of Appeals denied Cross-Petitioner's Petition for Rehearing and the Illinois Supreme Court refused to hear the case. This Cross-Petition follows.

REASONS FOR DENYING THE WRIT

I.

WHEN A MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED IS MADE, IS THE SUFFICIENCY OF A COMPLAINT BROUGHT PURSUANT TO 42 U.S.C., SEC. 1983 ALLEGING A DENIAL OF OR A RETALIATION BY A PUBLIC OFFICIAL OF A CITIZEN'S RIGHT OF ACCESS TO THE COURTS TO BE DETERMINED BY APPLICATION OF THE BALANCING TEST SET FORTH IN *PICKERING v. BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT NO. 205*, 391 U.S. 563 (1968).

Cross-Petitioner asserts that the Court of Appeals did not properly apply either step of the analysis of a claim of qualified immunity established by this Court in *Siegert v. Gilley*, 500 U.S. 226 (1991). The first of those steps is to determine if the allegations of the Complaint set forth facts which, if true, constitute a violation of a constitutional right. Cross-Petitioner asserts that the Court of Appeals erred in its analysis of this first step as it did not apply the balancing test established by this Court in *Pickering v. Board of Education of Township High School District No. 205*, 391 U.S. 563 (1968). He is wrong in several respects.

The first is that the case below was decided on a Motion to Dismiss. Under Illinois law, the facts alleged in the Complaint are admitted by a Motion to Dismiss and must be taken as true, *Long v. City of New Boston*, 91 Ill.2d 456, 64 Ill.Dec. 905, 440 N.E.2d 625 (1982). This Court also assumes on a Motion to Dismiss a Complaint the truth of the allegations in the Complaint, *Boddie v. Connecticut*, 401 U.S. 371, 373 (1971). A Motion to Dismiss for failure to state a cause of action attacks only the legal sufficiency of the Complaint and the only matters

to be considered in ruling on such a Motion are the allegations of the pleadings themselves, *Urbaitis v. Commonwealth Edison*, 143 Ill.2d 458, 159 Ill.Dec. 50, 57-58, 575 N.E.2d 548, 555-56 (1991). The only question presented is whether sufficient facts are contained in the record which, if proved, would entitle Cross-Respondents to relief, *id*. It is equally well established that evidentiary material outside the Complaint may not be considered in ruling on such a Motion, *id*. The only consideration is whether the allegations of Count I of the First Amended Counter and Third-Party Complaint state a legally sufficient cause of action against Cross-Petitioner, *id*.

It follows that the Cross-Petitioner's gratuitous recitation in his Statement of the Case and Argument of all the work and expense that his client had invested in the project before it enacted the Ordinances in question is irrelevant. Cross-Petitioner is arguing that *Pickering* requires the conclusion that the investment by the VILLAGE of significant time and resources in the improvements to the SPECIAL SERVICE AREA prior to the time it enacted the Ordinances in question outweighs Cross-Respondents' right to seek a judicial determination of whether or not the Ordinances which shift the burden of paying those costs onto Cross-Respondents were properly enacted. Yet, none of those facts appear in the Complaint. Under the proper procedural analysis, there are no other facts against which the Court may balance the allegations of the Complaint.

Another flaw in the Cross-Petitioner's reliance on *Pickering* is his mistaken belief that a citizen only enjoys a Constitutionally protected right of access to the Courts if the subject matter of the lawsuit addresses a matter of public concern. This Court has long recognized that the

right of access to the Courts protects private litigation so long as the suit has a reasonable basis in fact, *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731 (1983). This Court noted with approval that the First Amendment interest in private litigation includes compensation for violated rights and interests, the psychological benefits of vindication and the public airing of disputed facts, 461 U.S. at 743. Cross-Petitioner cites no case from this Court or any of the Circuit Courts of Appeal to support his contention that only lawsuits dealing with matters of public concern enjoy constitutional protection.

Cross-Petitioner also ignores the fact that the application of the *Pickering* test is limited to cases involving restrictions on the rights of speech and association of public employees by their governmental employers. This Court in *Pickering* struck a balance between the interest of public employees to comment as citizens on matters of public concern and the sometimes competing interests of public employers in promoting the efficiency of the public services it provides through its employees, 391 U.S. at 568. In doing so, however, this Court recognized that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the regulation of speech of the citizenry in general, *id.* Cross-Petitioner now argues that these same considerations enable him to balance the value of the construction project to the VILLAGE against Cross-Respondents' Constitutional rights.

Cross-Petitioner's argument also ignores the fact that the Constitutional right of access to the Courts implicates more than the question of free speech under the First Amendment to the United States Constitution contemplated by *Pickering*. This Court has stated that the

Constitutional right of access to the Courts is part of the greater right to petition government for redress of grievances and is "among the most precious of the liberties safeguarded by the Bill of Rights", see *United Mine Workers of America v. Illinois State Bar Association*, 389 U.S. 217, 222 (1967). The right to seek judicial redress is indeed grounded in the First Amendment, *California Motor Transport Company v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). But this Court has also noted that the right of access to the Courts is founded in the due process clause of the Fourteenth Amendment and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental Constitutional rights, *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974).

This Court has also viewed the right of access to the Courts as one of the privileges and immunities accorded citizens under Article IV of the Constitution and the Fourteenth Amendment, *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907).

Cross-Petitioner also argues that the Complaint fails to set forth any First Amendment deprivation as no facts are alleged to show an actual objective chilling effect on Cross-Respondents' protected activities. This assertion ignores the recognition by this Court that threats to and the filing of a lawsuit have a substantial chilling effect upon a citizen's willingness to engage in protected activities, *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 734 (1983). The acts of Cross-Petitioner put Cross-Respondents on notice that if they attempted to contest the VILLAGE'S action, they were subjecting themselves to the possibility of a burdensome suit. Regardless of how unmeritorious the suit was, Cross-Re-

spondents were on notice that they would have to retain counsel and incur substantial legal expenses to defend against it, 461 U.S. at 740. This Court has also recognized that the chilling effect of threatened and actual litigation is significantly multiplied where the Complaint seeks damages in addition to non-economic relief, 461 U.S. at 741. Such was the case herein. Cross-Petitioner's argument ignores that this Court has expressly noted that a lawsuit may be used as a powerful instrument of coercion or retaliation, 461 U.S. at 740.

The allegations of Count I of Cross-Respondents' Counter and Third-Party Complaint against Cross-Petitioner adequately set forth a deprivation of their right of access to the Courts.

II.

WAS IT CLEARLY ESTABLISHED AT THE TIME CROSS-PETITIONER ACTED THAT THE ACTS OF CROSS-PETITIONER IN THREATENING AND THEN FILING SANCTIONABLE SHAM LITIGATION TO PREVENT CITIZENS FROM SEEKING A JUDICIAL DETERMINATION OF THE VALIDITY OF ORDINANCES IMPOSING A NEW TAX UPON THEM VIOLATED CROSS-RESPONDENTS' CONSTITUTIONAL RIGHTS.

Once the Court finds that a Complaint adequately sets forth a Constitutional deprivation, the second prong of the *Siegert* test of qualified immunity requires the Court to determine if the Constitutional standards were clearly established at the time of the Defendant's action, 500 U.S. at 232.

Cross-Respondents agree with Cross-Petitioner that the Illinois Court of Appeals wrongly applied a subjective standard in its resolution of the issue of qualified im-

munity. In doing so, it improperly found that Third-Party Defendant, NANCY SMITH, the Village President, was entitled to qualified immunity due to the fact that she simply relied upon advice she received from Cross-Petitioner. While the Illinois Court of Appeals may have used the wrong analysis in its resolution of the issue of qualified immunity, it achieved the correct result in the case of Cross-Petitioner BATEMAN. Cross-Respondents are free to urge in this Court reasons for affirming the judgment of the Court of Appeals which may not have been relied upon by that Court, *California Bankers Association v. Schultz*, 416 U.S. 21, 72 (1974). In review of judicial proceedings, the rule is well settled that if the decision below is correct, it must be affirmed although the lower Court relied upon a wrong ground or gave a wrong reason for its decision, *Brown v. Allen*, 344 U.S. 443, 459 (1953).

The Court of Appeals was correct in finding that the damages action filed by Cross-Petitioner against Cross-Respondents was not only sham litigation but it was sanctionable under a Rule of the Illinois Supreme Court governing the filing of lawsuits which are not well grounded in either fact or law, Ill.S.Ct. Rule 137. The purpose of the Rule is to punish attorneys who plead frivolous or false matters or bring suit without any basis in law, *Ashley v. Scott*, 266 Ill.App.3d 302, 203 Ill.Dec. 757, 759, 640 N.E.2d 677, 679 (2nd Dist., 1994). Cross-Respondents submit that it was clearly established at the time Cross-Petitioner acted that the filing of a lawsuit in contravention of Ill.S.Ct. Rule 137 was not objectively reasonable. This Court has recently ruled that "sham" litigation is that which is objectively baseless in the sense that no reasonable litigant could realistically

expect success on the merits, *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. ___, 113 S.Ct. 1920, 1928 (1993). Conduct which is sanctionable is objectively unreasonable and thus constitutes a sham.

The Trial Court expressly held that Cross-Petitioner filed a damages action for an improper purpose (R.App. 3). The Court of Appeals affirmed this decision. This conclusively establishes that Cross-Petitioner filed a baseless lawsuit to conceal an attempt to directly interfere with the interests of Cross-Respondents, see, *Professional Real Estate Investors*, 113 S.Ct. at 1928.

At the time Cross-Petitioner threatened to and did in fact file a suit for damages against Cross-Respondents, it was clearly established in Illinois that Cross-Respondents were vested with a conditional privilege to file a lawsuit seeking a judicial determination of the validity of the Ordinances in question as individual citizens enjoy such a privilege in actions before judicial bodies in this State, *Arlington Heights National Bank v. Arlington Heights Federal Savings and Loan Association*, 37 Ill.2d 546, 229 N.E.2d 514, 517-18 (1967).

Illinois Courts had also recognized the illegality of filing a lawsuit, the purpose of which is not to seek favorable action from the Courts, but rather to injure an opponent in the exercise of rights secured to him, *King v. Levin*, 184 Ill.App.3d 557, 132 Ill.Dec. 752, 540 N.E.2d 492 (1st Dist., 1989); *Ray Dancer, Inc. v. The DMC Corporation*, 230 Ill.App.3d 40, 171 Ill.Dec. 824, 594 N.E.2d 1344 (2nd Dist., 1992).

Years before he acted, Cross-Petitioner was put on notice by the Seventh Circuit that if a public official

brings a baseless suit designed to deter individuals from enforcing their Federal Constitutional rights, they can be said to be depriving those individuals of those rights and such a deprivation, when done under color of law, is actionable under 42 U.S.C., Sec. 1983, *Tarkowski v. County of Lake*, 775 F.2d 173, 174 (7th Cir., 1985).

It was clearly established at the time Cross-Petitioner acted that if an official retaliates against an individual as a result of that individual's attempt to seek judicial intervention, said conduct contravenes Section 1983, *Matzker v. Herr*, 748 F.2d 1142, 1150 (7th Cir., 1984).

In a case which is closely analogous to this one, the Court had held that where a public body filed an action to condemn private lands in retaliation for a suit which the land owners had previously filed against that public body, a claim was stated pursuant to Section 1983, *Harrison v. Springdale Water and Sewer Commission*, 780 F.2d 1422 (8th Cir., 1986).

It was clearly established at the time Cross-Petitioner acted that a municipal official in Illinois was charged with knowledge of the applicable First Amendment law when dealing with citizens in the community, *Hansen v. Bennett*, 948 F.2d 397, 400 (7th Cir., 1991).

This Court had clearly established that it was illegal to employ judicial bodies by instituting proceedings without probable cause intending to deprive others of meaningful access to the Courts, *California Motor Transport Company v. Trucking Unlimited*, 404 U.S. 508, 512 (1972).

All but the plainly incompetent would have appreciated the illegality of Cross-Petitioner's conduct and known that by so acting they were breaking the law. The Court below properly determined that he was not entitled to qualified immunity.

CONCLUSION

The Cross-Petition for a Writ of Certiorari raises no significant Constitutional questions or issues of national importance and claims simply that Cross-Petitioner's case was wrongly decided by the Illinois Court of Appeals. For the foregoing reasons, the Cross-Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DANIEL P. FIELD
Counsel of Record
204 North West Street
Waukegan, Illinois 60085
(847) 662-5800
Attorney for Cross-Respondents

CROSS-RESPONDENTS' APPENDIX

STATE OF ILLINOIS
COUNTY OF LAKE–SS

IN THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT,
LAKE COUNTY, ILLINOIS

Gen. No. 93 MR 11

Village of Lake Barrington, et al.

vs.

Mary E. Hogan, et al.

ORDER

This matter before the Court upon the *Section 2-615 MOTION TO STRIKE COUNTS II AND III* of Plaintiff's *AMENDED COMPLAINT*, due notice having been given, and the Court being advised in the premises, it is hereby *ORDERED*: 1. The conditional privilege afforded to attorneys in the course of representing their clients is hereby expressly extended to the clients; 2. Counts II and III fail to contain averments from which an inference of "actual malice" may be drawn and Defendants' *Section 2-615 MOTION* is therefore *granted*; 3. It appearing that no set of facts can be alleged which will be legally sufficient to state a cause of action for intentional interference with contract or economic expectancy, Defendants' *MOTIONS* are granted *with prejudice*; 4. Leave is granted for Defendants to file their counterclaim and Third-party Complaint *instanter*; 5. The *Motion* of Cole-Taylor Bank to Strike Counts II and III is *granted*;

6. Plaintiffs' request for a S. Ct. Rule 304(a) finding is *denied.*

Dated at Waukegan, Illinois this
21st day of April 1993.

ENTER:

William D. Block
Judge

STATE OF ILLINOIS
COUNTY OF LAKE—SS

IN THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT,
LAKE COUNTY, ILLINOIS

Gen. No. 93 MR 11

Village of Lake Barrington, et al.

Plaintiffs

vs.

Mary E. Hogan, et al.

Defendants

ORDER

This matter before the Court upon Defendants' *MOTION FOR SANCTIONS*; due notice having been given, argument and proofs having been heard, and the Court being advised in the premises, the Court hereby FINDS:

1. The purported legal theories embodied in Plaintiffs' interference with contract/economic advantage Counts are without any reasonable basis in law or the extension or modification of existing law; 2. The filing of the tort claims was without any legitimate purpose; rather the claims were filed for the purpose of intimidating the Defendants. It is thus hereby ORDERED: 1. The *MOTION FOR SANCTIONS* is hereby *granted*; 2. Judgment is entered in favor of Defendants HOGAN, RUTH LOIACONO and SAM LOIACONO in the amount of $5,000.00 plus court

costs, and against the Plaintiffs and JAMES P. BATEMAN; 3. BATEMAN may post a personal $10,000.00 surety bond as an appeal bond & which, upon filing, shall stay this judgment; 4. The Village need not file a bond to stay this judgment.

Dated at Waukegan, Illinois this
11th day of August 1994.

ENTER:

William D. Block
Judge